

'Much ado about nothing?': comitology as a feature of EU policy implementation and its effects on the democratic arena

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“Much Ado About Nothing?”
Comitology as a Feature of EU Policy
Implementation and its Effects on the
Democratic Arena

Christine Neuhold

“Much Ado About Nothing?”

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Founded in 1963 by two prominent Austrians living in exile – the sociologist Paul F. Lazarsfeld and the economist Oskar Morgenstern – with the financial support from the Ford Foundation, the Austrian Federal Ministry of Education, and the City of Vienna, the Institute for Advanced Studies (IHS) is the first institution for postgraduate education and research in economics and the social sciences in Austria. The **Political Science Series** presents research done at the Department of Political Science and aims to share “work in progress” before formal publication. It includes papers by the Department’s teaching and research staff, visiting professors, graduate students, visiting fellows, and invited participants in seminars, workshops, and conferences. As usual, authors bear full responsibility for the content of their contributions.

Das Institut für Höhere Studien (IHS) wurde im Jahr 1963 von zwei prominenten Exilösterreichern – dem Soziologen Paul F. Lazarsfeld und dem Ökonomen Oskar Morgenstern – mit Hilfe der Ford-Stiftung, des Österreichischen Bundesministeriums für Unterricht und der Stadt Wien gegründet und ist somit die erste nachuniversitäre Lehr- und Forschungsstätte für die Sozial- und Wirtschaftswissenschaften in Österreich. Die **Reihe Politikwissenschaft** bietet Einblick in die Forschungsarbeit der Abteilung für Politikwissenschaft und verfolgt das Ziel, abteilungsinterne Diskussionsbeiträge einer breiteren fachinternen Öffentlichkeit zugänglich zu machen. Die inhaltliche Verantwortung für die veröffentlichten Beiträge liegt bei den Autoren und Autorinnen. Gastbeiträge werden als solche gekennzeichnet.

Abstract

The previously neglected phenomenon of governance by committees has recently received increasing attention in the academic literature.

This paper focuses on the consequences of the arrangements prevailing in the committees active in the implementing phase of EU-legislation on the practice of democracy and legitimacy. The so-called “comitology committees” can be seen as a good example of the tension between input- and output-based sources of legitimacy. On the one hand the EP has demanded its increased involvement in this system ever since these committees were established. On the other hand (preliminary) studies have shown that Members of the European Parliament seem to be overwhelmed with the scrutiny or even the filing of draft implementing measures. This gives rise to the question of increasing the legitimacy of committee work and at the same time preserving the “efficiency” of this (presumably) co-operative form of decision making.

This phenomenon is illustrated by means of a case study of committees active in the field of health and consumer protection.

Zusammenfassung

In den letzten Jahren wurde dem Thema des Ausschusswesens in der Europäischen Union (EU) immer stärkere Aufmerksamkeit in der wissenschaftlichen Literatur gewidmet. Dieses Working Paper nimmt jene Ausschüsse, die in der Durchführungsphase von EU-Recht aktiv sind, unter die Lupe. Diese sogenannten “Komitologie-Ausschüsse” können als gutes Beispiel für das Spannungsverhältnis zwischen verschiedenen Formen der “input”- und “output” Demokratie betrachtet werden.

Einerseits hat das Europäische Parlament seine verstärkte Einbindung in dieses System moniert, andererseits haben Studien ergeben, dass Mitglieder des Europäischen Parlaments (MdEPs) mit der Prüfung der Entwürfe für Durchführungsrechtsakte überfordert sind.

In diesem Zusammenhang stellt sich die Frage, inwiefern die Ausschussarbeit “legitimer” gestaltet und gleichzeitig die Effizienz dieser (kooperativen) Form der Entscheidungsfindung beibehalten werden könnte.

Dieses Phänomen wird durch eine Fallstudie über Ausschüsse im Politikfeld des Gesundheits- und Konsumentenschutzes illustriert.

Notes

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1. Introduction and scope of the analysis

The previously neglected phenomenon of governance by committees has recently received increasing attention in the academic literature (c.f. Pedler; Schaefer 1996, Van Schendelen 1998; Christiansen; Kirchner 2000, Rhinhard 2000). In various guises committees are active at every stage of the EU-decision making process, reaching from the expert groups of the Commission, the working groups of the Council to comitology committees.¹ The increasing role committees play within the European arena can be seen as a response to “the need for an even higher level of technical expertise, which stems from the growing complexity of regulating contemporary western societies.”²

This paper will focus on the consequences of the arrangements prevailing in the committees active in the implementing phase of EU-legislation on the practice of democracy and legitimacy. It will not dwell on the very complex decision making rules within these so called “comitology committees” which, although they have just recently have undergone extensive reform, are still a phenomenon that requires its very own science (Weiler et al. 1995, p. 9).

The tension between ‘input-’ versus ‘output-based’ sources of legitimacy seems, at least at first glance, to be manifest in the system of comitology committees: on the one hand one could argue that the support of citizens could be secured by consensual, efficient outputs of these fora. Institutions and procedures have to bring about effective solutions of problems (“*output-legitimacy*”).

With regard to the input-side, the political system has to be open to citizen participation and must enable effective transmission of relevant citizen interests into the process of governance. On top of that comes the democratic participation in- and competition over inputs; the ability of citizens to choose between rival elites or political agendas (“*input-legitimacy*”) (Hix 1998, Scharpf 1999, Benz 2001). For the EU system this would imply that regulators sitting in these committees have to be connected to majoritarian institutions.

A recent study has shown that the Members of the European Parliament (MEPs), although they have pressed for a greater involvement of the EP into the comitology system, for the most part do neither scrutinise nor ‘follow up’ the implementing acts transferred to them by the Commission under the various inter-institutional agreements (EIPA 1998). This gives rise

¹ A comprehensive study on the role of committees within the European system of governance is currently being conducted under the Fifth Framework Programme of the European Commission. Research Project “Governance by Committee, the role of committees in European policy-making and policy implementation” (Programme: Improving Human Potential and Socio-Economic Knowledge Base), Project No. SERD-1999-00128.

² See Technical Annex to the research proposal (submitted under the Fifth Framework Programme of the European Commission) “Governance by Committee, the role of committees in European policy-making and policy implementation” (Programme: Improving Human Potential and Socio-Economic Knowledge Base, Proposal No. SERD-1999-00128).

to the assumption that parliamentary oversight of executive power (at least in the unique set-up of the EU) meets certain limits in the practical political process.

The main controversy in what could be described as the “comitology-debate” is the question of the extent to which these committees affect the EC-implementing process and of how and by whom they should be supervised and controlled. The perception of the role of these committees range from “*one of the most serious democratic defects of this system*” (Pedler; Schaefer 1996 p. 23) to the impression that these fora deal for the most part with technical issues and retain their legitimacy by operating efficiently and through the quality of their output (Blumann 1992; Majone 1994).

Here the question of the separation of powers cannot be neglected completely. Community and Union governance “pervert” the balance between executive and legislative organs of the national governments and this balance between Commission autonomy and state-involvement is also apparent in comitology (Weiler et al. 1995, p.7, Marks et al. 1996, p. 367).

On the basis of a case study of committees active in the field of health and consumer policy, whose decisions can have direct consequences on the European citizen, the paper aims to analyse how decisions taken affect the democratic arena.

In this quest this paper intends on the one hand to examine questions such as the “pros- and cons” of increasing the involvement of MEPs within the comitology system and of enhancing the transparency of the committees. Closely linked is the question whether the competencies of the legislative authorities are deemed to be infringed upon. A special emphasis is put on the involvement of the EP in the implementing process, as the EP has put forward extensive demands in this context and was ready to resort to drastic measures such as putting in its veto in the legislative process when these were not fulfilled. This paper aims to examine these demands not only as regards to their practical feasibility but according to the costs involved and their credibility.

On the other hand, this paper aims to highlight **what** kinds of decisions are taken in this field, by devoting special attention to the question of separating seemingly “routine,” “technical” issues from those with political implications.

Another question up for examination relates to **how** decisions are taken and whether the ideal notion of decision-making within committees, the conception that decisions are taken on the basis of a deliberative and consensual nature, is valid within the practical political process. Limitations of the system will also be examined. The paper will close by formulating recommendations on increasing the legitimacy of these committees.

2. Development of committees

The genesis of the (in)-famous comitology committees, controlling and assisting the Commission in the implementing phase of EU legislation, dates back to the early hours of the Common Agricultural Policy (CAP). These initial steps, at the beginning of the 1960s, already required extensive and detailed technical regulation. The Council, the then one and only legislator, lacked not only the relevant insight, but also the resources to respond to the needs of day-to-day management in this area, which included the ability to take quick action. However, it did not wish to delegate the implementation of the acts it adopted to the Commission without retaining some form of control.

Several proposals were put forward as to how this could be accomplished. The rather unorthodox compromise that was finally reached provided for the creation of committees known as *management committees*. These were (and still are) comprised of representatives of the governments of the Member States whose task was to issue an opinion on the implementing measures proposed by the Commission.

However, the Commission was still entitled to adopt its proposed measures immediately, even if the committee gave a negative opinion by a qualified majority. In the latter case, the proposed measures had to be referred back to the Council, which could then take a different decision (by qualified majority) within a specified time – usually one month. This procedure, which might seem kind of inconsistent, allowed the Commission to take particularly urgent steps without delay, but at the same time provided the Council with the possibility of intervening and modifying the Commission decision.

Most sectors of the CAP were subsequently established on this basis and the implementation of decisions was carried out using a variation of this (only provisional) committee procedure in each sector.³

As further Community policies outside the agricultural field were established, different procedures for their implementation were created. Due to a growing conviction among several Member States that the existing procedures allowed the Commission too much leeway, the Council's control over Commission implementing measures was strengthened. In 1966 the Council debated about which committee procedure should be chosen to implement measures in the field of customs, veterinary legislation and legislation on feeding-stuffs and foodstuffs.

³ Before the end of the transition period for which the management committees had actually been established (on 31 December 1969), the Council decided to maintain the committees on a permanent basis. Management committees eventually came to be used for the entire agricultural field. By 1970 there were already 14 such committees, and seven years later the number amounted to 18.

As a compromise, the first *regulatory committee* was created in June 1968. The Commission could only implement its proposals if the committee approved them by a qualified majority. If this was not the case, it had to submit its proposals to the Council. This procedure introduced the provision that the Commission could nevertheless implement its proposals if the Council had failed to reach a decision within a certain period of time specified in the act. This possibility was called a *filet* (*safety net*) procedure. While the Council could agree to this type of committee for the area of customs, there was opposition from some Member States when it came to veterinary matters and the fields of plant health and feeding stuffs. Here, the *filet* procedure was complemented by the *contrefilet* (‘double safety net’) procedure. This meant that when the Council could not reach a positive decision by a qualified majority on the proposed measure, it could prevent the Commission from adopting the proposed measure by a simple majority.

The basic procedures for comitology committees were established on the basis of this compromise. However, their quantitative development was neither specified nor were criteria laid down with regard to their functioning, efficiency, financing and the type of procedure to be chosen in a specific policy field. In the following years, in fact up to the Council’s Comitology Decision of 13 July 1987,⁴ the Council used (usually slight) variations of these committee procedures when it delegated implementation powers to the Commission (Demmke, Eberharter, Schaefer, Türk 1996, p. 61f.).

It would go beyond the scope of this paper to provide a detailed analysis of both the comitology decision of 1987 and its revised version of 1999.⁵ At this point it suffices to say that the decision issued subsequently to the Single European Act (SEA) of 1987 codified the procedures, but led by no means to a simplification. The Council maintained not only the three procedures proposed by the Commission,⁶ but added two variants to the management and regulatory committee procedures. Within the regulatory procedures mechanisms were foreseen, which clearly provide the Member States with the most effective control over the Commission. Furthermore the Council reiterated its prerogative to reserve implementation for itself and inserted restrictive rules governing the conferment of implementing powers in the case of safeguard measures. The stipulations foresaw no involvement for the EP.

The reform of the very complex procedures in 1999 led to a certain amount of streamlining insofar as the procedures were reduced to three and the variants abolished. The EP was attributed (limited) controlling powers (see below).

⁴ Official Journal (O.J.) 1987, L 197, p. 33.

⁵ For an analysis of the comitology procedures according to the so-called “Comitology Decision of 1987,” see for example Pedler; Schaefer (eds.) (1996), pp. 61–82, for an overview see for example: Hix (2000), p. 69. For an analysis of the new Comitology Decision of June 1999 see: Haibach (1999).

⁶ Guided by what had been the practice since the 1960s, the Commission proposed three types of committee procedure: an advisory committee procedure, the traditional management committee procedure and a regulatory committee procedure with a *filet*.

3. Committees as a problem-solving arena

This part of the paper will focus on the “positive” aspects characterising committees such as their problem-solving capacity and the achievement of consensus.

Comitology committees have developed based on the principle “necessity is the mother of invention,” on an *ad hoc* basis. And although they have been the object of much (institutional) controversy (see below), they have become an intrinsic feature of the EU system of governance.

The system of comitology committees is only one reaction to growing complexity at all levels that challenge the “traditional” institutions of government:

“The profound differentiation and complexity of modern society is manifested in a number of different features that affect governance. The various processes relating to production, commerce, health, education, industries, service production etc. are not overseeable. In sum, there is great societal complexity. There is administrative complexity; there is technical and scientific complexity, complexity of social values and lifestyles. The established, formal institutions of government cannot handle this complexity.” (Andersen; Burns 1996, p. 236)

The actual functioning of committees active in the implementing phase of Community law may include actors who are both Member State representatives or have a special interest in the policy. The meetings are chaired by Commission officials.

The results of a survey on the experience of Member State officials in EU committees reflect that, out of 218 respondents, an overwhelming majority were from the Member State administrations; 180 respondents⁷ were delegated by ministries (Schaefer et al. 2000, p. 29).

The representatives in these committees deal not only with technical issues such as *establishing the ecological criteria for the award of the Community Eco-label to single-ended light bulbs*,⁸ but with issues of high political sensitivity such as biotechnology regulation, BSE and dioxins. For the most part, however, these committees deal with “routine” matters, – as shown by a study conducted by the European Institute of Public Administration for the EP (European Parliament 1999, p. 21). The scrutiny of 204 implementing acts, stemming mainly from the environmental sector and the field of economic and monetary affairs, revealed that the task of the committees was mainly of a technical nature: for example establishing conditions (e.g. for the award of the Community eco-label for laundry detergents) or annexes

⁷ The overall sample was composed of Members from the Commission, the Council Working Groups and comitology committees.

⁸ European Commission (1993): Document n° XI/200/93 – Rev.1.

were adapted to technical progress (e.g. for cosmetic products). Only two cases were identified where an infringement of the competencies of the legislative authorities are deemed to have taken place.

Co-operative forms of decision taking have increasingly become manifest in these committees where the actors share notions of validity and “*a set of normative and principled beliefs*” (Haas 1992, p. 3). The members of these committees, which are not directly elected, have in some instances known each other for years and sometimes meet on a weekly basis.⁹ This partly enables them to come to a consensus rather quickly. The respective figures reflect that only in exceptional instances do some of these comitology committees make use of the (legal) possibility of referring a matter to the Council.

Matters referred to Council 1993–1998

Opinion of Committee ¹⁰	Matter referred to Council	Council opposed with SM ¹¹	Opposition with QM or unanimity
approx. 3000	32	3	8

European Commission 1998, in: Sauron 1999, p. 52

This data suggests that the comitology committees could be regarded as a problem-solving arena, which is insulated from political pressure. Meeting *en camera*, secluded from the gaze of the public eye, solutions are found within these fora that seem, at least at first glance, to bear the virtue of the deliberative and consensual nature of decision making, relying on scientific expertise and evidence. They operate based on culture of *output*-legitimacy, implying that legitimacy can be obtained by generating effective (implementing) legislation (Rhinhard 2000, p. 28). Joerges and Neyer characterise comitology committees in the foodstuffs sector as generating a “culture of inter-administrative partnership which relies on persuasion, argument and discursive process.” (Joerges; Neyer 1997b).

Giovanni Sartori who focuses in his article “Will Democracy Kill Democracy?” on the decision making procedures in committees found that consensual forms of decision-taking prevail (Sartori 1975, cit. in Toeller 1998, p. 7). Although in comitology committees majority voting is possible, in the vast majority of the cases no majority decision is taken, as indicated by an analysis of a sample of implementing measures (European Parliament 1999, p. 25ff.). To Sartori, who aims to determine the optimal size of a decision-making body, reducing on the

⁹ One example is the management committee for sugar, whose representatives meet once a week.

¹⁰ These figures only concern the regulatory committees.

¹¹ SM: simple majority; QM: qualified majority.

one hand decisional costs and on the other hand external risks, the consensus-orientation of committees is a logical consequence of certain qualities characterising a committee:

- a) The limited number of members of a committee: in comitology committees member states usually delegate between up to 1–3 members;
- b) the fact that these members represent a certain constituency;
- c) that the committee is a durable and institutionalised group;
- d) the fact that the committee is usually confronted with a flow of decisions.

The tendency of committees to decide unanimously is relevant for the question of democracy as they aim at reducing the external risks of the individual who has delegated the right to decide (Toeller 1998, p. 8).

A survey on Swedish participants in EU committees also highlights the consensual atmosphere prevalent in committees: more than 80 % of the respondents affirm that “a spirit of co-operation” characterises group activities to a high degree (Elgström; Jönsson 2000, p. 689).¹²

An assumption, put forward by Joerges and Neyer, is that national delegates in the committees undergo a process of “*Europeanisation*,” contributing to a co-operative atmosphere and thereby facilitating the achievement of consensus:

“They slowly move from representatives of the national interest to representatives of a Europeanised interadministrative discourse in which mutual learning and understanding of each other’s difficulties surrounding the implementation of standards becomes of central importance.” (Joerges; Neyer 1997a, p. 291)

This analysis is, at least at first glance, somewhat questioned by the results of the above mentioned survey on the experience of Member state officials in EU committees, which reflects that supranational allegiances seem to be secondary to national loyalties: 69 % of the respondents delegated to comitology committees answered that they feel allegiance to their own government but still a high percentage of officials (44 %) felt responsible to the committee they participated in. Another interesting result in this context is that 81 % of the representatives of comitology committees responded that they give much consideration to

¹² In 1998 a questionnaire was distributed to 421 Swedish participants in EU expert groups, working groups and comitology committees. The response rate was 65 %. (See: Elgström; Jönsson 2000, pp. 684–704).

proposals and statements from their **own** Member State, whereas 57 % answered that they would pay much attention to arguments from the Commission (Schaefer et al. 2000).

Nevertheless one must underline that a clear-cut majority (79 %) expressed trust in the Commission as they affirm that it acts independently from national interests. In the same line of argument falls the response that 26 % of the members of comitology committees state that they have regular contact with Commission officials **before** participating in committee meetings (not only to receive information but also to receive news).

These findings give rise to the interpretation that although national concerns still play a vital role, a certain degree of loyalty to the supranational institutions can not be denied. Sheer intergovernmentalism is transcended insofar as the quality of the argument seems more significant than the national affiliation of the respective representative: 69 % of the members of comitology committees stated that they would give much consideration to Member States who have demonstrated a certain degree of expertise on the respective subject matter. Only 30 % of the respondents argued that they would pay much attention to colleagues from large Member States (Schaefer et al. 2000, pp. 32–35).

This goes into the same direction as the findings of Lewis who observed that members of Council Working Parties perform a double role, having a dual personality and as one governmental representative claimed, are wearing a “*Janus face*.” The representatives share a collective rationality based on the dual responsibility to deliver the goods at home **and** on the EU level. They wear “*two hats*,” defending national interests and having a responsibility vis à vis the Community. Before this background, compromise seeking has developed “*into an art*.” (Lewis 1998, pp. 483–485).

4. Comitology as a black box

Despite these positive aspects, reservations remain. This form of oversight, which is classified, according to a scheme developed by McCubbins and Schwartz, as **police-patrol oversight**, is characterised as the most intrusive and expensive form of oversight (McCubbins; Schwartz 1987).

At first glance the remarkably low rate of committee referrals to the Council seems to suggest that the Commission is largely independent in its actions. However, rational anticipation of committee action by the Commission may mean that the Commission is effectively controlled by the Member States, despite the rarity of sanctions against it. Having one’s proposal referred from a committee to the Council can reportedly cast along shadow over career prospects as a Commission official. As Pollack points out the story does not stop here, however, for two reasons:

The highly complex procedures impose varying requirements on the Commission – and varying thresholds to overruling actions by the committee and the Council. Commission discretion is constrained to varying degrees depending on the type of committee procedure selected.

Although the Member States are provided with the most effective control over the Commission when installing a committee functioning according to the regulatory committee procedures, this presents Member States with a clear trade off between Member State control on the one hand, and speed and efficiency of decision-making on the other (Pollack 1997, p. 115).

Besides being “*intrusive and expensive*” a number of other criticisms can be levelled:

- 1) High complexity: the rules are complex, where even committee members are often unaware of the respective procedures being used in the committee they are a Member of.¹³ Rules of procedure are currently an exception, where only an estimated of one third of the comitology committees possess such a document;
- 2) lack of transparency: there is a general lack of transparency about the whole process. Not only do committees meet behind closed doors, but it is difficult to obtain information about what decisions are taken and how. Although this varies according to sectors, where some progress is made in the field of the CAP for example (see below) and the new comitology decision foresees some provisions on transparency, the process is still rather opaque. It is curious for example that the EC budget provides the most complete list available to public scrutiny of how many committees exist but that internal lists of the Commission stipulate different, notably higher, figures (European Commission 1997, p. 9);
- 3) lack of accountability: members of the comitology committees are delegated by the Member States’ administrations, where it is entirely up to the Member States who is delegated to represent their interests. The accountability of the officials is limited insofar as there are only directly accountable to their government. Some have argued, however, that government by networks as practised by the EU provide – normatively superior – opportunities for accountability (Joerges; Neyer 1997). Although patterns of governance practised (inter alia) in committees may indeed yield higher levels of inter-elite accountability from which the public may benefit indirectly, the public itself is at this point excluded from any process of deliberation or contestation (Lord 1998). If at all, consensus is achieved at an elite level behind closed doors.

¹³ Interviews conducted with committee members, EIPA Seminar, September 1998.

5. Comitology as a source for (volatile) conflict between the Institutions

Although the system of comitology seems, at least at a first glance, to be working satisfactorily, it is an issue that, at least in the past, has also been a volatile source for conflict between the EU-institutions. The most adamant critique has come from the European Parliament (EP) for the following reasons:

- 1) Intransparency of the committee structure: committees are regarded as a Trojan horse, by which national interests are ‘carried into’ the implementation process of community law;
- 2) comitology is seen as a strategy of the Council to circumise the participation of the EP within decisions;
- 3) another fear is that by limiting the decision making powers of the Commission by way of the committees this could undermine the possibility of the EP to hold the EU executive accountable (Toeller 1999, p. 342).

It might be interesting to point out that the EP expressed its opposition to these organs even before these committees were formally established, notably in December 1961 (European Parliament 1961). Within the course of time the EP has resorted to several instruments to try to get across its demands such as blocking part of the budget for committees (for example¹⁴) and bringing a charge of annulment before the European Court of Justice (ECJ) against the comitology decision of 1987.

Further actions of the EP include an internal organisational reform to enable its committees to scrutinise the comitology system with more efficiency, the vetoing of legislation due to “inadequate” comitology procedures and the conclusion of inter-institutional agreements such as the Plumb-Delors agreement,¹⁵ the *modus vivendi* of 1994¹⁶ and the Samland-

¹⁴ This happened in 1995 and 1998, where the EP blocked 90 % of the budget for committees.

¹⁵ On the 14. of March 1988 this agreement was concluded with the aim of providing effective information to-and the effective consultation of the Parliament. It was established by an exchange of letters between the then President of the Commission, Jacques Delors, and the then President of the EP, Henry Plumb, the Commission committed itself to forwarding to the Parliament all draft implementing acts at the same time as they were forwarded to the implementation committee (European Parliament 1988).

¹⁶ On 20 December 1994 the Council, the EP and the Commission reached an agreement on a *modus vivendi*. It foresaw that the appropriate committee of the EP be sent, at the same time and under the same conditions as the comitology committee, any draft general implementing act submitted by the Commission, together with the timetable. This procedure also applied to urgent measures.
In cases where measures adopted or envisaged by the Commission were not in accordance with the opinion delivered by a comitology committee or where, in the absence of an opinion, the Commission had to submit a proposal to the Council, the Commission had to notify the appropriate EP committee. Furthermore if the draft

Williamson agreement.¹⁷ Whereas the first two agreements aimed to provide the EP with enhanced information rights as regards to comitology, the Samland-Williamson agreement stipulated that MEPs can, under certain circumstances, attend committee meetings.

The conflict came to an all-time high after the enforcement of the Maastricht Treaty (1993) where the EP was put on an (almost) equal footing with the Council in the legislative process, but the implementing measures remained unchanged. The main demand of the EP was that it should be put on the same level with the Council as regards to reviewing, approving and vetoing proposed implementation measures. For the practical political process this would mean that each time an executive measure, which has been adopted under co-decision, is referred back to the Council by the respective comitology committee, it should also be referred to the EP (European Parliament 1993). The driving force behind this claim was that the EP feared that measures decided together with the Council under co-decision would then be amended substantially by using the “backdoor” of comitology committees.

Two notable examples where the EP made use of its veto right were the proposal on open network provisions to voice telephony (ONP)¹⁸ and the establishment of a committee in the securities sector.¹⁹ In both cases the Council and the EP disagreed on the type of procedure, the Council choosing to “tighten” committee procedures to provide the Member States with the most effective control over the Commission.²⁰ The EP opposed the Council’s choice as the Member States would be given the discretion to make substantial changes to measures agreed upon in the legislative process.

The Intergovernmental Conference of 1996 failed to tackle the issue of comitology, postponing yet another “hot” issue. A Declaration relating to the Comitology Decision was

general implementing act is referred back to it, the Council could only adopt this act after informing the EP and setting a reasonable time limit for obtaining its opinion. In the case of an unfavorable opinion the Council had to take “due account of the EP’s point of view” without delay. Additionally, the Commission had to take into account, as far as possible, any comments by the EP and keeps the Parliament informed at every stage of the procedure (European Parliament 1995).

¹⁷ This agreement between the Commission (between the then Secretary General of the Commission, David Williamson) and the European Parliament (and the then Chair of the EP budget’s committee, Detlev Samland) of September 1996 provides for measures regarding transparency in management and regulatory committee proceedings. Its main provisions include that: the Commission shall make available to Parliament, “in good time in advance of committee discussions, the annotated agendas for each meeting of management and regulatory committees”; the Commission shall make available to Parliament the “results of votes in management and regulatory committees (votes for and against and abstentions)”; if “Parliament or a parliamentary committee wishes to attend the discussion on certain items on the agenda of a committee, the chairman will put the request to the committee, which may take a decision; if the committee does not accept the request, the chairman must give reasons for the decision; Parliament may wish to publicize such reasons.”

¹⁸ OJ C 263, 12 October 1992, p. 20–31.

¹⁹ See OJ L 141, 11 June 1993, p. 1 and OJ L 141, 11 June 1993, p. 27.

²⁰ In both cases the Council foresaw a regulatory committee, variant b. In this case the Commission can adopt the proposed measures unless the Council has *decided against* them by a *simple majority*.

merely annexed to the Treaty of Amsterdam:²¹ “The Conference calls on the Commission to submit to the Council by the end of 1998 at the latest a proposal to amend the Council decision of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission.”

The EP set out almost immediately to put forward proposals for reform, which were based on four main pillars:

- 1) a clearer definition of legislative and executive actions: “general measures” should fall exclusively into the realm of the legislature, “substantive provisions” may be legislative as well as executive and “implementing provisions” fall exclusively into the scope of the executive;
- 2) the EP should be given the possibility of effective control over implementing measures: it should be able to amend or withdraw an implementing measure if delegation procedures have been violated or the content of the implementing measure is in fact of a legislative nature;
- 3) the simplification of the committee system by abolishing all management and regulatory committees;
- 4) “regular and timely” information by the Commission including the composition, the legal basis of executive measures, publication of committee minutes and votes, and a register of interests of committee members (European Parliament 1998b; Hix 2000, p. 73f.).

The Commission complied well in time as it put forward its proposal already in July 1998, where it took almost one year until the Member States could agree on a new regulation.²² This new comitology decision of 1999 foresees a certain amount of involvement for the EP within the comitology system.²³

²¹ Declaration No. 31 relating to the Council decision of 13 July 1987.

²² OJ C 279, 1998, p. 5.

²³ OJ L 184, 17.7.1999, p. 23–26.

Involvement of the EP under the new comitology decision

I) For implementation of acts which have been adopted according to Art. 251 TEC²⁴

- a) The Commission submits draft measures for the implementation of instruments to the committees and the EP;
- b) if the EP finds that draft implementing measures “exceed implementing powers provided for in the basic instrument” the EP has to indicate this in a resolution;
- c) the Commission shall subsequently re-examine the draft measures;
- d) the Commission shall inform the EP and the committee of the action which it intends to take on the EP-resolution and of its reasons for doing so.
- e) Taking the resolution into account and within the time limits of the procedure under way, the Commission may:
 - 1) submit new draft measures to the committee;
 - 2) continue with the procedure;
 - 3) or submit a proposal to the EP and the Council on the basis of the Treaty, so that the legislative process starts again. (This was a possibility the Commission had already proposed in its proposal for reform of the Comitology decision.) It is rather unlikely, however, that Council and EP will resort to this measure, as concessions achieved in the legislative process, possibly in conciliation would be declared as void.

II) Involvement of the EP under the regulatory procedure

If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall, without delay, submit a proposal relating to the measures to be taken to the Council and shall inform the EP.

²⁴ Treaty on the European Community

If the EP considers that a proposal submitted by the Commission²⁵ “*exceeds the implementing powers provided for by the basic instrument,*” it shall inform the Council of its position. Under all other procedures the EP indicates its reservations in a resolution.

The Council **may** (not shall, it is up to its own discretion) “*where appropriate in view of any such position,*” act by qualified majority on the proposal²⁶ (within a period to be laid down in each basic instrument but which shall in no case exceed three months from the date of referral to the Council). If the Council indicates by qualified majority that it opposes the proposal, Commission must re-examine the document.

The Commission then has 3 possibilities:

- 1) can submit its amended proposal to the Council;
- 2) resubmit its proposal;
- 3) or put forward a new legislative proposal on the basis of the Treaty.

If after the expiry of the specified period the Council has neither adopted the proposed implementing act nor indicated its opposition to the proposal for implementing measures, the Commission shall adopt the proposed implementing act. This provision of the new procedure can be seen as a “fire-alarm” or “early warning procedure,” as it gives the EP the possibility of presenting its reservations to the Commission or Council. The legal implications for the EP are restricted insofar as the Commission cannot be forced to withdraw its proposal. The ultimate decision whether a legal act is *ultra vires* or not lies with the European Court of Justice in the context of the procedure according to Art. 230²⁷ (where the EP has a privileged role) (Haibach 1999, p. 16).

The information rights of the EP were improved, as it shall now receive:

- agendas of committee meetings;
- draft measures submitted to the committees for the implementation of instruments adopted under the co-decision procedure;
- voting results;
- summary minutes of the meetings; and
- a register of the organisations delegating the representatives of the Member States.

²⁵ Pursuant to a basic instrument adopted in accordance with the procedure laid down in Article 251 of the Treaty.

²⁶ 62 out of 87.

²⁷ Ex-article 173 TEC.

The EP shall also be kept informed whenever the Commission transmits measures or proposals for steps to be taken by the Council. Furthermore, it has to be mentioned that the new comitology decision foresees that certain provisions on transparency apply to the committees. These stipulations include for example that the principles and conditions on public access to Commission documents shall be applicable to the committees²⁸ and that the Commission shall publish a list of the committees, which assist her in the exercise of implementing powers.

An overall evaluation of the implications of the new comitology decision for the EP shows that the involvement of the EP boils down to a so called *ultra vires* control which is to ensure that implementing measures do not go beyond the implementing provisions foreseen in the basic instrument. Thus, the EP is not placed on an equal footing with the Council. In some aspects the decision is not as far-reaching as what has been enshrined in the agreements such as the *modus vivendi* or Samland-Williamson agreement (Haibach 1999, p. 16).²⁹ Nevertheless the decision seems to be met with acceptance by the EP. It indicated at the end of May 1999 that it “could accept the compromise solution as in particular the so called ‘double safety net’ was abolished and the Council will have to decide in future by qualified majority to oppose a Commission proposal. The EP also welcomes the fact that under the new system it is provided with comprehensive information-rights (General Affairs Council 1999).

In a more detailed analysis, the EP states that the new decision on comitology “*only partly meets the expectations of the European Parliament, but nonetheless constitutes a real step forward in comparison with the previous situation.*” (European Parliament 2000, p. 5) At this point it has to be mentioned that the EP and the Commission have concluded an agreement on implementing the new Comitology Decision. Here, after “*some difficult debates*”,³⁰ the EP accepted that all previous inter-institutional agreements (Plumb-Delors, *modus vivendi*, Samland-Williamson agreement) should be declared as void. The documents that have to be referred by the Commission to the EP will be forwarded electronically (once the technical arrangements have been made). Each institution will draw up internal administrative procedures with a view to provide all the requisite guarantees for forwarding confidential documents.

²⁸ These principles are laid down in the Commission Decision of 8 February 1994 on public access to Commission documents 94/90/EC.

²⁹ The new decision does for example not provide for the (theoretical) possibility for MEPs to attend committee meetings, nor does the EP have the right to give an opinion in cases where the Commission makes a proposal to the Council under the regulatory committee procedure.

³⁰ Interview with a member of the Commission General Secretariat, 16 January 2000.

Another stipulation narrowing down the provisions of the decision is that when the EP adopts a resolution³¹ it has to do so in plenary and has one month to comply. In urgent cases (in particular on public health grounds) this limit can be shortened by the Commission (European Parliament 2000, p. 8).

6. The implications of the involvement of the EP in the comitology system for the practical political process

As illustrated above, ever since the instalment of the first comitology committees, the EP has put forward far-reaching demands regarding its involvement in the comitology system. Translating them into political science terms, they could be summarised in the following manner:

- 1) A clear definition of the boundary between legislative and executive matters, so that executive authority would be strictly responsible for implementing measures;
- 2) when implementing acts have been adopted by way of co-decision in the legislative process, the EP should be put on an equal footing with the governments of the Member States;
- 3) limiting the executive powers of the Member State governments (at least to a certain extent);
- 4) the right for the EP to receive (and scrutinise) all draft implementing acts before their adoption together with the implementing timetable;
- 5) the right for the EP to veto legislation before it is implemented;
- 6) the meetings of the committees to be held in public.

Although these demands might seem justified at first glance, after closer scrutiny they appear somewhat problematic. First, the line that separates “**routine**” implementing measures from those with **legislative** (and budgetary) implications is rather difficult to draw. Of course, it seems fairly logical that the EP as the parliamentary organ of the EU aims to limit the scope of executive acts to implementing measures with only minor political implications. Apart from the fact that this claim of the EP is based on weak grounds when

³¹ In this resolution it has to indicate that draft implementing measures exceed the implementing powers enshrined in the basic instrument, adopted under co-decision.

looking at other political systems,³² the distinction between political and “non-political” issues is not as easy as it seems. Extremely technical and seemingly “routine” issues can involve crucial decisions with large political implications touching for example upon questions of an ethical and moral nature (as is reflected by the case study below).

Second, a participation of the EP together with the Council when an issue is referred from a comitology committee does not have to be automatic. Of course it seems convincing that when Council and EP acted as co-legislator, the EP should also be involved when general legislative principles are touched upon or existing acts are amended or updated. The comitology decision of 1999 tackles this question insofar as the EP can now, under the regulatory procedure,³³ inform the Council of its position, given that the comitology committee gave a negative or no opinion. This is of course still well far off from an equal footing with the Council. However here we touch again upon the above mentioned issue: some measures are purely of an executive nature and the involvement of the EP would be superfluous. A system would have to be established within the EP whereby measures with legal implications could be distinguished from executive acts without putting too much burden on the internal structures of the EP.

Third, stripping the Member States of their executive powers would be highly problematic as in the field of implementation of single market legislation the Member States play a crucial role in supporting the Commission. The Commission possesses neither the personal, administrative nor financial means to be solely responsible for the implementation of legislation. Due to the fact that only 20,032 civil servants³⁴ work in the European Commission, the Commission depends on this network of expertise for assistance in its tasks in the implementation process. By involving the representatives of the Member States into this conglomerate, which has been coined as the “Europe of administrations” the Commission has furthermore an insight into the positions of the Member States which gives it the possibility to facilitate the implementation of legislation as compromises and solutions can be found at an early stage.

Hix argues in this context that the EP should accept that the EU has a “*dual executive*,” which would enable the EP to exert parliamentary oversight (in combination with the parliaments of the Member States) over the Commission as well as over the national governments (Hix 2000, p. 74–76).

³² Just like in the US for example the Commission would be in the legal position to claim that once power is delegated by the Council and the EP, the EP has no more right to interfere.

³³ This provision applies to acts that were adopted under co-decision (Art. 251 TEC).

³⁴ This figure refers to March 1999. Source: European Commission.

Fourth, the demand of the EP to receive and scrutinise all implementing measures would put a large financial burden on the EP. The EP itself admits that it is not equipped to scrutinise these measures:

“Neither the European Parliament nor its standing committees is yet adequately equipped to scrutinise technical proposals forwarded to expert committees. In particular, it lacks the scientific and technical expertise to do so [...]” (European Parliament, 1998b, p. 21).

If the EP were to analyse, even though superficially, each implementing measure forwarded to it by the Commission as regards to whether this measure “*exceeds the implementing powers provided for in the basic instrument,*” as foreseen by the comitology decision, this would imply that this would put a large burden on the personnel and financial resources of the EP.³⁵ Furthermore these resources would at least to some extent be taken from those resources substantial for amending and scrutinising legislation.

The EIPA study from 1998 (on the impact of European Community implementing measures) shows that from approximately 1376³⁶ measures that the Commission forwarded to the EP (according to the *modus vivendi*) only 204 could be retrieved, where the bulk of these acts (114) fell into the sphere of competence of the EP committee on the Environment, Public Health and Consumer Policy (EIPA 1998). These results give rise to the hypothesis that MEPs as ‘representative democrats’ are somewhat overwhelmed even with the scrutiny and ex-post control of implementing measures, as even the mere filing of some of the documents seems to be a problem.

Furthermore, issues at stake in comitology committees require a high degree of technical or scientific expertise, which MEPs generally do not possess.

Fifth, the right to veto executive measures before they are implemented is unrealistic, when looking at examples such as the US Congress or the German Bundesrat; neither possess such a right. From both a practical and political perspective, it is more realistic for legislatures to possess the right to challenge executive measures *after* they have been implemented (Hix 2000, p. 76).

Sixth, another demand of the EP is that committees should meet in public in order to ensure that “problematic items” are publicised. This would be a first step to improving the citizen’s possibility for direct interaction with public officials:

³⁵ This applies to acts that have been adopted under co-decision (Art. 251 TEC).

³⁶ This data is based on a list that the General Secretariat of the EP forwarded to EIPA.

“If the expert committees have to meet in public, or at least to publish their documentation, then pressure groups, lobbies or concerned individuals will be able to bring to Parliament’s (and the public’s) attention any problematic items, which can then be dealt with by appropriate Parliamentary procedures.” (European Parliament, 1998b, p. 21)

Here one could argue that if committees met in public on the one hand one could assume that these meetings could possibly be rather uninteresting for the “average” citizen, as the issues discussed are often of such a technical nature. On the other hand, for matters that are indeed of a political nature with (possibly) far reaching implications such as BSE one could speculate that these issues would not be discussed in an open forum, but again be transferred behind closed doors.

Case study

The case, which is to be dwelt on very briefly, is notable as it highlights sensitive issues in terms of democracy within the sphere of comitology. As it combines a series of rather unusual issues one cannot say, however, that it is of an exemplary nature, but can be used to indicate more precisely how the committee system functions.

In the context of a very topical example, the BSE crisis seems to underpin the allegations of the EP that “public health concerns were insufficiently taken into account by comparison with the economic imperatives of the single market” (European Parliament 1997).

The background is that meat and bone meal was produced in the UK using hexane processing and heat treatment at 130°. Under circumstances and for reasons, which remain somewhat obscure, the British authorities gave the go-ahead for the treatment at a significantly lower temperature³⁷ in 1980. The European Community introduced the first directive (90/667/EC) regulating the production of meat-and-bone meal in 1990, stipulating that these substances must be treated at a certain temperature.³⁸ This directive was, however, accompanied by questionable derogations.³⁹ And although the UK banned the use of meat-and-bone meal in ruminant feed in Britain, exports of these products continued to be permitted. The British Secretary of Health then reported (on the 20th of March 1996) on a study, which established the possible link between BSE and a new form of Creutzfeldt-Jakobs Disease.

³⁷ 80–90°.

³⁸ 130°.

³⁹ Art. 19 of the directive enables the Member States to use other methods for heating that allow similar guarantees.

As is well known an embargo was decided on 27 March 1996 on the export of gelatine, tallow and semen from Great Britain. This is where the committees came in, as this far-reaching measure was revoked within a very short period of time. The Commission passed its proposal on the lifting of the embargo onto the Standing Veterinary Committee (IIIb-committee), which could not find a qualified majority in support of the proposal. The Agricultural Council, which was convened on the 3^d of June 1996, could also neither agree on an amended version of the proposal, nor could it find a simple majority for vetoing the Commission proposal. The Commission was then, according to the stipulations of the so-called *contrefilet* procedure, enabled to adopt the proposal by itself and the embargo could subsequently be lifted on 11 June 1996.⁴⁰

This case pinpoints the weakness of the committee procedures. Although in the new comitology decision, the so-called safety net (whereby the Council could reject the measures with simple majority) has been abolished, the illustrated weakness remains. If the Council can neither adopt the implementing act nor can find a qualified majority to indicate its opposition,⁴¹ the Commission can adopt the measures. So, the executive can, under certain circumstances, decide on measures even if the issue has been referred back to the legislator. What is also noteworthy is that the new comitology decision provides for criteria, which are to assist the legislator(s) in its/their choice of committee procedure, but are, however, of a non-binding nature. These criteria are relevant for our case study insofar as they foresee that the regulatory procedure is to be followed as regards to “*measures of general scope designed to apply essential provisions of basic instruments, including measures concerning the protection of the health or safety of humans, animals or plants [...]*.” This implies that (given these criteria are applied) matters such as the BSE issue would also in the future fall under the regulatory procedure.

According to Claude Blumann and Valerie Adam the BSE crisis illustrates that the “*procedures do not offer to some states, protecting the temple of comitology, the absolute guarantees that they are looking for.*”⁴² (Blumann; Adam 1997, p. 268)

The case goes beyond procedural specificities insofar as it also unveiled weaknesses in the system of scientific advisory committees. The Scientific Veterinary Committee assisted the Commission in its decision to lift the embargo. Being composed of high-ranking scientists in the field of veterinary medicine and microbiology, British representatives played a major role.⁴³ The committee had the task to advise the Commission as regards to necessary steps

⁴⁰ OJ L 139, 12 June 1996.

⁴¹ Within a period that is laid down within each basic instrument, but which shall in no case exceed three months from the date of referral to the Council.

⁴² Translation by the author.

⁴³ In the sub-group of the Scientific Veterinary Committee, it was almost always a British representative who was chairing the meeting (Blumann; Adam 1997).

and to provide it with information on scientific and health related issues. This advice, as a scientist from the Stuttgart-Hoheheim University stated, was not always of a scientific nature:

“The veterinarians on the Scientific Veterinary Committee acted against all standard microbiological practices. Their recommendation is incomprehensible and borders on the irrational. No housewife would make jam in such disastrous conditions.” (Agence Europe, N°6847, 6 November 1996, p. 13)

This view is somewhat supported by the then Commissioner Edith Cresson:⁴⁴

“Competition is often perceived as an end in itself. When the embargo on British products was decided, I heard the Commissioner for competition declare that this was the end of the single market... Then there is the committee of veterinary experts, who represent the interests of the Member States. I would like to say that some degree of scientific independence prevails, but I have my doubts.” (European Parliament 1997, p. 14)

The events surrounding the BSE crisis gave rise *inter alia* to the instalment of a parliamentary (temporary) Committee on Inquiry on BSE, which led to a complete transformation of the system of scientific advisory committees in the Commission. A scientific steering committee as a coordinating body for the many specialised scientific committees has been called to life in 1997. The selection of the members of the scientific committees was conducted in a way to ensure a high degree of transparency: the call for expressions of interest for the post of member of a Scientific Committee was placed on the Internet. Minutes and opinions of the scientific steering committee also as regards to the recent developments linked to BSE are also scanned in, with the aim of guaranteeing at least a certain amount of transparency (http://europa.eu.int/Comm/food/fs/sc/index_en.html).

7. (Concluding) observations

Comitology committees can be seen as the “dual-executive” pillars contributing to the functioning of the EU’s engine since the beginning of the 1960s. They have become a pivotal element in the implementing process of EU legislation, linking the European and the Member States level. The members in these committees are on the one hand confronted with having to find solutions that are issue-specific and have to be accepted by a majority of the Member States and on the other hand have to pay attention not to violate national concerns, as the results achieved still have to be met with acceptance “back home.” A survey has shown that the representatives in comitology committees have a somewhat split identity: they feel *both*

⁴⁴ Responsible between 1995–1999 for science, research and development; Joint Research Centre; human resources, education, training and youth.

an allegiance to the Community and to their Member State. In this climate of transcended intergovernmentalism a consensus can be found rather quickly and only in exceptional cases is a measure transferred to the Council. The abolition of these committees is not only highly unrealistic (around 400 such committees⁴⁵ exist, with sometimes very detailed portfolios) supporting the understaffed Commission in its executive tasks.

The modus of delegating (unelected) Member State officials and staffing them with far-reaching controlling powers over the Commission gives rise to questions of democratic legitimacy. The EP has pressed for its involvement, even before these committees were officially “born.” The conflict was aggravated at the beginning of the 1990s when the EP obtained co-legislative rights with the Council, but the implementing provisions remained untouched, foreseeing no involvement for the EP. Before this background the parliamentary body was ready to bring the legislative process to a halt, fearing that provisions that were agreed in the legislative process would be undermined in the implementing phase, involving two levels of bureaucrats: Member State officials and Commission representatives. The EP brought forward manifold demands ranging from the right to veto implementing acts, to opening committee meetings to the public and giving the EP extensive scrutiny right over executive measures.

A rather detailed analysis on the impact of European Community implementing measures on the EC legislative authorities has shown that the EP’s demand to oversee all implementing measures, well before they are enacted, would meet with practical constraints as the EP committees have in some cases not even been able to file the measures. Another relevant result is the fact that measures dealt with in these committees are in fact of a routine nature. A permanent involvement in the EU implementing process would therefore place a great burden on the EPs (limited) financial and personal resources, not to much great avail. A full-blown involvement of the legislator in the implementing process could not only be seen as violating the principle of balance of powers, but would also not meet the interests of EU-citizens: MEPs would have (even) less time for involvement within the legislative process and to strengthen the direct link to the prospective voter by “campaigning” in their “own” constituency.

Only in selected cases such as the (above mentioned) example of BSE are the competencies of the legislative authority infringed upon. Even after the reform the comitology decision of 1987, the procedures are still codified in such a way that the Commission could under certain circumstances adopt a legal act. Closely linked here is another aspect of great relevance in this debate of increasing the democratic legitimacy of committees: the intransparency and opaqueness of their working methods.

⁴⁵ This figure refers to the number of the committees listed in the EU budget. (Inofficial) estimates are much higher.

It is difficult to convey to the “average” citizen why the Commission should suddenly adopt a measure with (possibly) far-reaching implications on the European consumer, such as lifting the embargo on the import of certain beef products from Great Britain.

A first step in closing the gap between the Community on the one hand and the citizens on the other would be to increase the transparency of committee work, which leads me to a series of suggestions. These are to be seen by no way as exhaustive, but more as a point of departure. They go beyond the mere question of increasing the openness of committees by trying to tackle the question of enhancing legitimacy of these fora:

8. Suggestions and...

- 1) Increased transparency: In the quest of increasing the citizen’s possibility to get an insight into developments on European level, i.e. those fora “merging” the European and national level, the opportunities for involvement, information and scrutiny need to be improved substantially. One step in this direction, which has started to bloom for example in the field of agriculture, is to make documents relevant to committee work available on the Internet. Not only can fact-sheets be downloaded that outline the workings of the different committees, but one will also find short reports on the meetings of management and regulatory committees, giving an overview of the content of the matter discussed, whether a vote took place (whether it was favourable or not) and which Member States were present and which Commission officials chaired the meeting (http://europa.eu.int/comm/agriculture/minco/index_en.htm). Nothing speaks against opening committees to a (partial) public of “informed experts” or private actors (Toeller 1998, p. 9). Opening the committee doors, be it only to a selected public, would send the signal that committees have in fact “nothing to hide.” Currently, acting behind an aura of secrecy gives the impression that decisions of high importance are taken in these committees, where in fact most of these measures are of a routine nature. In order not to sacrifice efficiency a possibility would be that the “intruders” would not attend all committee meetings, but would have to place a request to the committee chairman.
- 2) Clear definition of the task of the implementing committee: One way to avoid the infringement of competencies of the legislative authorities would be to lay down the task of the implementation committee in the legal act. The regulator needs to be aware that although the distinction between seemingly technical issues and those with political implications is difficult to draw, more general value-related matters should be decided upon in the legislative process. For matters falling under co-decision the EP could play an active role in shaping this definition. The comitology decision of 1999

picks up on this notion by introducing criteria, trying to limit the choice of committee procedures. They are, however, non-binding.

- 3) No general involvement of the EP in the executive process: As argued in this paper, a plethora of reasons speak against a general involvement of the EP in the implementing process. However, the EP could resort to limiting the scope of discretion already in the legislative process. Another possibility would be for the EP to generate general rules as regards to the appointment of committee-members and by increasing the transparency of decisions. As Hix points out these observations are confirmed at an empirical level. Both in the United States and Germany, constitutional courts have restricted the role of the legislature to that of an *a priori* delegator and the *ex post* involvement in the adoption of new legislation. The German *Bundestag* is allowed an *ex post* veto, but only as far as issues of special political sensitivity are concerned and *after* executive instruments have been enacted. The US Congress has also found that extensive oversight over federal agencies is extremely costly, and to rely on private interests to challenge decisions can not only be cheaper, but more effective. (Hix 2000, p. 77).

...Outlook

The removal of executive powers from the Member States seems highly unlikely and undesirable, at least in the near future. Representatives in comitology committees are, as experts from the Member States, familiar with the (technical) aspects of a specific issue. They function within a culture of *output-legitimacy*, signifying that through their expert knowledge they contribute to the EU decision-making process by generating a constant flow of (implementing) acts. Assisting and controlling the Commission in the implementation of legislation they can be seen as deriving their legitimacy through the quality of their output and their efficient operation.

The general involvement of MEPs as *representative democrats*, being directly elected by the citizens of the EU Member States, in the implementing process would not make the implementation of legislation “democratic” *per se*. This strategy of increasing the power of the EP in the executive process would be flawed as the elections to the EP are at least at this point in time “second order national elections” and the principle “one man, one vote” is not secured (Hix 1998; Smith 1999).

The EP should rather concentrate on the legislative process, design rules or means to limit the means for *ex post* oversight mechanisms. The provisions of the “new” comitology decision of 1999 are based on this notion. They foresee that for draft implementing acts adopted under co-decision the EP has the possibility to scrutinise whether the stipulations exceed the implementing powers provided for in the basic instrument. These and other

provisions, providing for example for comprehensive information rights for the EP and more transparency within the committee system in general, could bring an end to the power struggle between the institutions over comitology.

The opening up of the committee system to (at least a partial) public and a “wide-ranging, highly participatory normative discourse” (Andersen; Burns 1996, p. 246) would be a vital next step to enhance the legitimacy of the system and generate public support.

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List of Abbreviations

CAP	Common Agricultural Policy
EC	European Community
ECJ	European Court of Justice
EEC	European Economic Community
EP	European Parliament
EU	European Union
OJ	Official Journal
ONP	Open Network Provision to Voice Telephony
SEA	Single European Act
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
QMV	Qualified Majority Voting

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